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SUMMARY. Insitutional Act No. 8 amends those provisions of the 1967 Constitution dealing with the judiciary. It transfers the powers of appointment, promotion, and removal of members of the lower courts from the Supreme Court of Justice to the Executive Power. It also reorganizes and sets limits on that portion of the judiciary which, under administrative law, can review actions of GOU entities. The Act puts on an interim basis of four years the length of present appointments of all judges, during which period the Executive Power can remove them without cause. Finally, the Act sets forth changes in the constitutional provision concerning military jurisdiction and includes an article providing for restrictions on the freedom of movement of individuals within Uruguay. Initial reactions to the Act have been negative. END SUMMARY.

PART I. The Judiciary

Articles 1 through 20 of the decree replace Section XV (The Judicial Power) of the Constitution, except for Chapter XI of Section XV (which provides for constitutional review by the Court of Justice) and Articles 252 and 254 which deal with legal representation to the poor and conflict of interest. The name of the section is changed from "The Judicial Power" to "Jurisdiction" in line with the decree's withdrawing from the Supreme Court of Justice (now to be known as the "Court of Justice") the powers of appointment, promotion and removal of.

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members of the appellate tribunals, lower court judges, public defenders, justices of the peace, and court clerks and other employees of the judiciary. The Court of Justice can now only propose persons for these positions to the Executive Power, which in turn has the authority to appoint them or others.

The "directive, corrective, advisory, and economic supervision over the tribunals, courts and other dependencies of the Judicial Power" previously exercised by the Supreme Court of Justice under Article 239 (2) of the Constitution has been modified to state that the new Court of Justice will only "exercise institutional and juridical primacy" over the other judicial bodies. Where previously the Court of Justice had direct control over such matters, it can now only propose transfers, promotions, and the disciplining of members of the judicial branch to the Executive Power, which now has final disposition.

As for the "Court of Justice" itself, the number of members (five) remains the same under the Act; the qualifications to be a member remain much the same. However, rather than being selected by the legislative power by a two-thirds vote of its membership, as provided for by the previous Section XV, members of the Court of Justice are to be nominated by the Executive Power and designated or confirmed by the Council of the Nation (the Council of State plus the "Junta de Generales").

The other changes rendered by the Act to Section XV are in line with the theory, as stated in the preface of the Act, that the previous supervisory and administrative powers of the Supreme Court of Justice can interfere with its purely juridical role. This administrative role under the Act is to be turned over to the Executive Power, largely acting through the Ministry of Justice.

Thus, Article 233 of the Constitution ("The Juridical Power shall be vested in the Supreme Court of Justice and in the tribunals and courts as prescribed by law") is now changed to read: "Juridical functions will be exercised by the Court of Justice and the tribunals and courts, in the manner prescribed by law. Juridical activity implies the exercise of an inherent power of decision, sovereign and independent, even though in the sphere of administrative activity there exists a functional chain of hierarchy which emanates from the Executive Power and continues until the lowest government body involved in the Administration of Justice, as long as it does not affect the juridical activity."

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The preface to the Institutional Act argues that Western democracies accept the primacy of the Executive Power over the legislature and judicial and no longer recognize the dogma of an absolute governmental separation of powers.

The preface to the Act also makes reference to the constitutional practices of other countries, including the United States, Great Britain, France and West Germany, which provide for the appointment of the judiciary by the Executive or Legislative Branch, or both. It goes on to quote the French constitutional doctrine that "there does not exist any authority of the judiciary that is not conferred and maintained by the President", a "reflection that coincides with the precepts of modern Public Law that underlie this Institutional Act".

PART II. Administrative Law

The Act amends Section XVII of the 1967 Constitution and, in doing so, appears to circumscribe considerably judicial review of government actions that do not present constitutional questions. (The Act leaves intact Chapter IX of Section XV of the Constitution, permitting constitutional review by the Court of Justice.)

As before, the top judicial body that can review other government actions that do not involve a constitutional question is the Contentious Administrative Tribunal, composed of five members whose qualifications, remuneration, appointment to and duration in office are the same as those for members of the Court of Justice. The Act reorganizes this tribunal, establishes lower administrative courts (lawyer courts of the first instance for contentious - administrative disputes), and changes the procedures to be followed and the remedies to be applied in judicial review of administrative matters. Some of these changes are esoteric and need not concern us here.

Where before Article 509 of the Constitution provided that the "Contentious Administrative Tribunal shall hear pleas for the nullification of definitive administrative acts performed by the government in the exercise of its functions which are contrary to a rule of law or which are a distortion of authority", the new Act sets out restrictions on this authority. Article 31 of the Act states: "The following cannot be subject to the nullifying authority of the court: A) Governmental and Political Acts; B) those acts which for reasons of security or the public interest the Law has declared not subject to this review or those acts of an administrative nature which for these same reasons the Executive Power has declared not subject to this review; and C) Discretionary Acts." However, with regard

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to (B) these acts are subject to judicial review for those causes of action brought for reparations or indemnity for damages due to government actions. What governmental, political and discretionary acts are is not spelled out or defined.

This restriction on the nullifying power of those courts reviewing administrative acts appears to almost do away with one check the judiciary may have previously been able to exercise over the Executive. This is in keeping with the theory on public law expounded in the preface that gives primacy to the Executive Power.

PART III. Tenure of Judges and Other Judicial Personnel

Article 42 of the Institutional Act provides that magistrates may not be removed from office until they reach the retirement age of 70 (same as before) and can occupy their positions as long as they maintain good behavior. However, with respect to lawyer judges in the lower ordinary and administrative courts, all such future appointments will be of an "interim" or provisional character lasting four years. During this period the Court of Justice or the Contentious Administrative Tribunal may recommend their removal to the Executive Power. After this provisional period their appointments will be considered confirmed and made permanent. This provision is also applicable to public defenders. The technical, administrative, and service personnel in the ordinary and administrative justice systems are subject to discharge at any time and are designated directly by the Executive Power.

The Act designates the Ministry of Justice as the governmental entity in charge of administrative relations between the Executive Power and all juridical entities, except for those in the military. The magistrates belonging to the ordinary or administrative justice system, prosecutors, personnel subject to the administrative control of the Ministry of Justice, whatever their grades, are prohibited under penalty of immediate dismissal from forming associations or unions, except for social or recreational associations.

In one of its more controversial provisions the Act, in Article 48, declares all present appointments of magistrates, whatever their grade, in the ordinary and administrative justice systems, to be of an "interim" or provisional character to last four years from the date of issuance of the Act. During this time the Executive Power, on its own initiative or the the recommendation of the Court of Justice or the Contentious Administrative Tribunal, can remove any of these judges. After four years those judges still remaining will be considered confirmed in their positions. This provision does not appear to

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be applicable to the Court of Justice or the Contentious Administrative Tribunal.

This of course provides a basis for "purging" those judges that the GOU feels may have sympathized, or currently sympathize, with the Tupamaros or other extreme leftist elements. In the preface, in referring to the changes set forth in the Act, a statement is made to the effect that "with instruments of this kind it will be possible to assure the formation of a judicial power that is dignified and independent, in the exact meaning of these words, that is to act in accord with the law and not convert itself into a refuge of interests and ideologies... (The) setting up of a provisional period of four years for all lower court appointments will serve as a testing period which permits an evaluation of the attitude and fitness of the magistrate." Referring specifically to the judges to be affected by Article 48, the preface states that "it is notorious and it is not pleasing to admit this, that there are magistrates whose conduct has not rendered them fit to occupy such high positions".

PART IV. Other Changes

The Act expands Article 253 of the Constitution ("Military Jurisdiction shall be limited to military offenses and to a state of war") to state that "military jurisdiction comprises those powers that the military courts have been given to investigate, try and sentence those accused of those military crimes as established by Law". (Article 18) This appears to incorporate the powers already given to the military court system under the 1972 National Security Law and a December 1975 Law (see Ref A) to conduct the pre-trial investigation, arraignment, trial and possible sentencing of persons accused of terrorism, subversion, and other "crimes against the nation".

The Act, in Article 19, also provides a basis in the Constitution for limiting freedom of movement within Uruguay: "The freedom of movement within Uruguay can be limited by the judicial authority by virtue of a law promulgated for reasons of general interest when such a law is necessary to prevent criminal acts." The Act appears to lay the basis for such a law rather than setting forth such a restriction itself. It may, according to some sources, have something to do with the "preventive measures" set out in the proposed State of Danger Law (see Ref B).

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PART V. Reaction to Institutional Act No. 8

The reaction was negative in both the opposition "El Dia" and the normally pro-government "El Pais". Both deplored what they consider the loss of independence of the judiciary that the Act will entail as well as the violation of Uruguay's traditional doctrine of the separation of powers. Dr. Enrique Tarigo, the lawyer-manager for "El Dia", titled his article "The Judicial Power Has Died" and took exception to the fact that the Act wrought changes in a constitutional document (approved by the legislature and a plebescite in 1966) by an Institutional Act signed only by the President and the Ministers of Interior and National Defense.

The initial reactions of Embassy contacts were negative as well. Although there are complaints about delays in the legal system, the civilian judiciary is by and large a respected institution in Uruguay. Even those willing to concede that the GOU has some justification in ridding the judiciary of personnel sympathetic to extreme leftist causes feel that the Act goes too far. While final judgment on the Act has to await viewing how it is applied in practice, it can by no means be said at this time to be a popular measure.

Note: Copies of Institutional Acts 7 and 8 will be forwarded by another airgram.

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